No. 83-305

In The

Supreme Court of the United States

October Term, 1983

THE PEOPLE OF THE STATE OF CALIFORNIA,
Petitioner,

vs.

ALBERT WALTER TROMBETTA, et al.,
Respondents.

ON A PETITION FOR WRIT OF CERTIORARI TO THE CALIFORNIA COURT OF APPEALS FIRST APPELLATE DISTRICT

BRIEF FOR RESPONDENTS

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QUESTIONS PRESENTED

The Court of Appeal of the State of California, First Appellate District, has construed the due process clause to require in a driving under the influence criminal case, that where evidence is collected by the State, as it is with the Omicron Intoxilyzer, or any other breath testing device, law enforcement agencies must establish and follow rigorous and systematic procedures to preserve the captured evidence or its equivalent for the use of the defendant. This Court held that the failure to preserve evidence in the face of available steps to do so, required the suppression of the results of the Omicron Intoxilyzer test at trial. The questions presented here are:

1. Does the duty to preserve material evidence under federal due process forbid the use in a driving under the influence case of a breath testing device and the results of the test where there are known approved and available steps to obtain and preserve another breath sample for retesting by the defendant but no steps are taken by the prosecution?

2. Does a duty to preserve material evidence under federal due process, compel law enforcement to do so for subsequent use by the defendant, where they have the capability of doing so as an incident to a procedure routinely performed by law enforcement?

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STATEMENT OF THE CASE

Procedural Background

(a) The Trombetta and Cox Cases

Prior to their consolidation by Division Four of the First Appellate District of the California Court of Appeals, on December 30, 1982, these cases followed diverse procedural roadways. In the *Trombetta* and *Cox* cases, the Municipal Court of the County of Sonoma denied Respondents' pre-trial motions to suppress evidence consisting of the results of the Omicron Intoxilyzer breath tests[1].

[1]There was a stipulation between the Prosecution and Defendant Trombetta that the motion to suppress would be deemed a trial motion binding on the Prosecution and Trombetta at trial. (J.A. 163-164, 168); Reporter's Transcript (hereinafter R.T.) 4-5, 37. This same stipulation was entered into between the Prosecution and Defendants Cox, et al., as to their respective similar motions and the stipulation encompassed an agreement that the *Trombetta* case would be determinative of the Cox group of cases. (J.A. 79.)

Appeals to the Appellate Department of the Superior Court of Sonoma County resulted in affirmances of the lower court order based upon the holding in *People v. Miller* (1975) 52 C.A.3d 666, 125 Cal. Rptr. 341, but this same Court by unanimous order certified the cases for transfer to the First Appellate District of the California Court of Appeals pursuant to the provisions of Cal.R.Ct. 63(a). Division Four of that court accepted transfer.

(b) The Ward and Berry Cases

In the *Ward* and *Berry* cases judgments of conviction for driving under the influence of alcohol were entered in the Municipal Court of Contra Costa County. The Contra Costa County Appellate Department of the Superior Court affirmed those convictions, but this three judge panel unanimously certified the questions now before this honorable Court to the Third Division of the First Appellate District of the California Court of Appeals. That Division summarily denied transfer. Respondents *Ward* and *Berry* then individually petitioned the California Supreme Court for Writs of Habeas Corpus. That Court, following extensive briefing, ordered the People in *Ward* and *Berry* to show cause before the Fourth Division of the First Appellate District of the California Court of Appeals why relief should not be granted as prayed for by *Ward* and *Berry*.

Division Four of the First Appellate District of the California Court of Appeals (hereinafter *Trombetta* Court), first rendered its decision on March 28, 1983. Following extensive briefing on a motion to reconsider, the *Trombetta* Court filed a modified opinion on April 27, 1983, which did not change the judgment. Petitioners refer to the final decision as Trombetta II, whereas there is only one exhaustively well considered *Trombetta* decision in the California Court of Appeal. A Petition for

Hearing in the California Supreme Court was denied on June 23, 1983.

Certiorari was granted herein on January 9, 1984.

FACTS

Each Respondent was arrested for driving under the influence of alcohol. (Formerly, *California Vehicle Code Section* 23102(a); now Section 23152(a).)

Each was asked to select one of three blood alcohol level tests; blood, breath or urine, pursuant to procedures outlined in *California Vehicle Code* § 13353. The percentage of alcohol in breath and urine is ultimately translated into a percentage of alcohol in the blood. Police officers urged the Respondents to take the breath test and each complied. Each Respondent then submitted to a breath test on the Omicron Intoxilyzer (*Trombetta* opinion, J.A. 154.)

Had any Respondent selected the blood or urine test, the *California Administrative Code* required the remaining portion of the sample be saved for one year for defendants' retesting. (Title 17, *California Administrative Code*, § 1219.1 and § 1219.2, *Trombetta* Exhibit "D" in evidence, J.A. 220-223, R.T. 30-31.) No similar provision is made for breath sample retention although Title 17 of the *California Administrative Code* permits the use of a breath capturing instrument for later analysis (§ 1219.3, § 1221.1(c))[2], (*Trombetta* Exhibit "D" in evidence, J.A. 223, 229, R.T. 30-31).

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[2]Section 1221.1(c) provides that: "C. Breath alcohol analysis may be performed on samples which are collected with a sample capturing instrument designed for entrapment of a breath sample or for entrapment of the alcohol in a breath sample for *later analysis*." (Emphasis supplied.)

Consistent with their custom and practice at that time, the police officers made no attempt to and did not retain a sample of Respondents' breath. It was "conceded that no effort was made to capture breath specimens for later testing by the defense." (*Trombetta* opinion, J.A. 158.)

The Respondents were not informed nor did they know that if they selected the breath test as opposed to the blood or urine test, a sample would not be retained for them. Had they been so advised, each would have refused the breath test and selected a blood or urine test so that a sample would be available for retesting. (*Trombetta* Exhibit "C" in evidence, J.A. 205-207, R.T. 30; *Cox*, J.A. 71-74, *Ward*, J.A. 106-107)

At the time of each of these arrests there was available to law enforcement California State Department of Health Services approved equipment making retention and preservation of the breath sample collected for later analysis simple, feasible, inexpensive, accurate, and useful. (J.A. 175-187, R.T. 59-77, J.A. 195-198, R.T. 116, 126-127, 128-130; *Trombetta* Exhibit "A" in evidence, J.A. 200-205, R.T. 26-27, J.A. 81, 102-105.) Significantly, these facts were uncontradicted in any of these four consolidated cases before this Court.

In the proceedings in the case of *People vs. Trombetta*, the Prosecution and *Trombetta* stipulated to the following at the Municipal Court level in Sonoma County. Respondents urge that these stipulations are in and of themselves sufficient to resolve this case in their favor:

1. At no time prior to or after the intoxilyzer test was administered to Respondent did any law enforcement or peace officer advise Respondent verbally or in writing that there would be no sample of his breath preserved for retesting or for any other purpose. (J.A. 165, R.T. 34)

2. At the time and place of the collection of the breath sample on the intoxilyzer there was and is and had been available to the County of Sonoma a device approved by the Department of Health of the State of California for the collection of a breath sample for later testing. (J.A. 165-167, R.T. 34-36)
3. In this case there was no sample collected for the purpose of later analysis. (J.A. 168, R.T. 36, 37)
4. The approved device which collects and captures breath samples (Intoximeter Field Crimper-Indium Tube Encapsulation kit) for later testing is financially feasible for the State to use and is simple to operate. (J.A. 183, 184, R.T. 69)
5. The approved device which collects and captures breath samples for later testing can be used at any place or location, such as at a police station or in the field. (J.A. 183, R.T. 67, 68)
6. The ruling of the lower court herein subject to all proper appellate review would be binding on the Petitioner *People* and the Respondent *Trombetta* at the trial. (J.A. 163-164, R.T. 4-7; J.A. 168, R.T. 37)

Petitioner ignores the stipulations and proceeds as though they do not exist. Petitioner has steadfastly chosen to ignore the entire record in these cases.

In these cases appropriate discovery motions and demands were made on the People, inter alia, for the production of breath samples for retesting. (J.A. 6-12, 92-108, 113-121.) It was conceded, as recited in the *Trombetta* opinion, (J.A. 158), that no effort was made to retain breath specimens for later testing by the defense.

Respondents introduced uncontradicted evidence by testimony[3] and declaration which, in several instances, was

[3]For some of Mr. Murray's qualifications see J.A. 168-175.

corroborated by an expert called by the People. Summarized, the evidence established:

1. There is and was an approved method of collecting breath samples for later testing, (which continues to be approved), and had been available to law enforcement in California since 1973. A description of the approved device is set forth in *Trombetta* Exhibit "E" in evidence, (J.A. 247, R.T. 31-32) (Testimony of Donald Murray J.A. 175-176, R.T. 59, 60);
2. There are other methods of preservation of breach samples for retesting, such as the Silica gel cylinder, used in Colorado, which may be utilized in conjunction with the Omicron Intoxilyzer with a minor modification thereto. (This adaptation has not yet been approved for use in California but Petitioner in the briefing upon this appeal scrupulously avoids setting out the reasons for failure to approve Silica gel (Testimony of Donald Murray J.A. 191-193, R.T. 82-84);
3. The Omicron Intoxilyzer is non-specific for alcohol and can and does register false positive readings under certain conditions e.g. acetone (Testimony of Donald Murray J.A. 187, 188-191, R.T. 77, 79-82);
4. The Gas Chromatograph Intoximeter, is and was an approved device for use in California for the testing of breath samples for alcoholic content and approved for use in conjunction with the Intoximeter Field Crimper-Indium Tube Encapsulation Kit, (hereinafter referred to as Kit) (Testimony of Donald Murray J.A. 175-183, R.T. 59-67). The Gas Chromatograph Intoximeter is specific for alcohol and does not register false positives as

does the Omicron Intoxilyzer, and is therefore more reliable and trustworthy (Testimony of Donald Murray J.A. 187-188, R.T. 75-77);

5. That samples of breath collected by use of the Kit may be retested from three months to one year following collection with scientifically reliable results (Testimony of Donald Murray J.A. 184-186, R.T. 71-75);
6. The retest using the Kit will prove or disprove the accuracy of the test made on the Omicron Intoxilyzer (Testimony of Donald Murray J.A. 190-191, R.T. 81-82; Testimony of Eugene Person, Prosecution Expert, *Trombetta* Hearing J.A. 196-199, R.T. 129-130);
7. That a subsequent breath sample collected within a few minutes from the time of collection of the original samples on the Omicron Intoxilyzer would be a valid comparison sample for the determination of the accuracy of the Omicron Intoxilyzer results (Testimony of Donald Murray J.A. 193-194, R.T. 106, 107; Testimony of Eugene Person J.A. 196-198, R.T. 128-30);
8. That prior to the use of the Omicron Intoxilyzer by law enforcement in Sonoma and Contra Costa Counties, each county routinely used the Kit, and the laboratories under contract with law enforcement in each county, analyzing Kit breath samples for alcohol content, routinely retained breath samples from the Kit for referee retesting upon request by the defendant. When these two counties began doing their own testing through law enforcement's laboratory, each county consciously abandoned the saving and preservation of a breath sample but continued retention of blood

and urine samples. Each county thereafter adopted the Omicron Intoxilyzer as the breath testing device knowing it would not preserve a sample of breath for later testing and each county chose not to use the approved available device, (the Kit), to preserve a sample for retesting (*Trombetta* Exhibit "A" in evidence; Declaration of Jerry W. Curry J.A. 200-205, R.T. 26-27; Declaration of Mr. Kenneth Parker J.A. 103-104; Declaration of Richard Kiszka; Testimony of Donald Murray J.A. 188, R.T. 79).

Eugene Person, the *only* expert witness ever produced by the People in any of these cases now before this court, testified in the *Trombetta* hearing as follows:

Direct Examination

"Q. What is your current occupation?

A. I'm a criminalist employed by the State Department of Justice, working at the Santa Rosa Laboratory.

Q. How long have you worked at the Department of Justice?

A. I have been with the Department of Justice approximately 11 years, perhaps 12. I have been at the laboratory here since it opened in 1975.

Q. In your work with the Department of Justice, have you been certified as a forensic alcohol analyst?

A. I'm certified as a forensic alcohol supervisor. (J.A. 194-195, R.T. 116.)

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Q. Mr. Person, from what you have told me, this —the Intoxilyzer machine does not purge itself without the air pump use, does it?

A. It would over a considerable period of time, but not within the immediate time frame of an analysis.

Q. You haven't done any tests to determine how long it takes for the Intoxilyzer chamber to purge itself without the assistance of the air pump, have you, sir?

A. No, sir. I just know it's more than a ten, fifteen, twenty minute period.

Q. Just ten, fifteen?

A. I say it's longer.

Q. But you wouldn't know whether it was an hour, five hours or a day, would you?

A. No, sir, I wouldn't. (J.A. 195, R.T. 126-127.)

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Q. All right. So this pump is designed to kick enough clean air through there to clear out all of the contaminated air from any suspect or from a simulator solution; is that right?

A. That's correct, yes.

Q. Because you wouldn't want to take another test if there was some contaminated vapor in there that was other than clear or air blank; is that right?

A. Well, you couldn't get an accurate test.

Q. That's right. Now, Mr. Person, there is no law in the State of California and no regulation in the State of California that would prohibit a police agency from having an Intoximeter Field Crimper Indium Tube Encapsulation kit available at the police station to collect a separate sample before or following any test run on the Intoxilyzer; isn't that correct?

A. Well, there's no law that I know of that says that any of the approved instruments could not be kept at one location.

Q. In other words, you might have all three of them there and use all three?

A. There's no law that says you can't as far as I'm aware.

Q. You're aware that the Intoximeter Field Crimper can be utilized separate and apart from the In-

toxilyzer machine to collect a breath, are you not?

A. That's the only way it can properly be used.

Q. Now, Mr. Person, if you were to administer as an operator of Intoxilyzer 4011 AW machine to test on a suspect and you went through all the procedure on the Intoxilyzer to do that and then you collected another sample using the Intoximeter Field Crimper within a few minutes following the test on the Intoxilyzer, you would expect, would you not, that the test collected by the Field Crimper would be a valid sample and would co-relate in qualitative integrity for testing as against the Intoxilyzer test, would you not?

A. Well, since the procedure you speak of, the Indium Tube Encapsulation kit or whatever, since it has been approved by the Department of Health who did run tests on it before approval for breath testing, I would have no reason to suspect that any sample taken according to directions with that particular method would not be valid as much as one taken by another method.

Q. That's what I was driving at. And if it was taken within a few minutes following the Intoxilyzer test, you would regard that as a valid sample for checking against the Intoxilyzer, would you not?

A. I would see no reason to have a check.

Q. Well, regardless of whether you would feel that there was a reason to have a check or not have a check, such a sample collected by the Crimper in your opinion would be a valid sample to test against the Intoxilyzer, would it not?

Mr. Tansil: Objection; argumentative.

The Court: Overruled.

The Witness: I would expect the two to agree, but I'm not sure who I'd say was checking who.

By Mr. DeMeo:

Q. But you'd expect the two to agree?

A. I would expect it, yes. (J.A. 196-198, R.T. 128-130).

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Q. Are you also familiar with Title XVII regarding the collection of breath analysis by the various machines that are authorized by the State of California?

A. In general. I'm sure I've read them, but I can't say that I specifically recall any particular point.

Mr. DeMeo: I'd like to, if I might, approach Mr. Person.

The Court: Sure.

By Mr. DeMeo:

Q. Directing your attention to Article Five which speaks of collection and handling of samples, Section 1219. Are you familiar with that provision that requires that samples taken for forensic alcohol analysis and breath alcohol analysis shall be collected? Are you familiar with that?

A. I'm familiar with the article, yes.

Q. And are you familiar with the specific section on breath analysis which speaks in terms of the collection of the breath sample?

A. Yes, I am familiar with the word being used.

Q. Are you also familiar with the approval issued by the State of California on the Intoxilyzer 4011 model which indicates that immediate analysis of breath samples collected by direct expiration of the subject into the instrument in which the measurement of alcohol concentration is performed? Are you familiar with that?

A. Yes, I'm aware of that.

Q. Can you state whether or not the procedural guide that you have told us about that's in the book or wherever concerning the operation of the Intoxilyzer, does it talk about the collection of a sample?

A. Now that you specifically mention it, I'm not certain, but it possibly does.

Q. In fact, it does talk about the collection of a sample, does it not, with the Intoxilyzer machine?

A. As I said, I'm not sure.

Mr. Tansil: Objection; asked and answered.

The Court: This is cross-examination.

The Witness: Very probably it does.

By Mr. DeMeo:

Q. 'Very probably it does.' Is that your answer?

A. Yes, in the same sense that the regulations speak of collections." (J.A. 198-199, R.T. 131-132.)

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The Declarations of Jerry W. Curry (J.A. 200-205); Kenneth W. Parker (J.A. 102-105); and of Richard E. Kiszka, Ernest J. Williams and Manley J. Luckey, the latter three of which Declarations were submitted with the Traverse/Denial to Return to Order to Show Cause in the *Ward* Habeas Corpus Proceeding, shed further light on the questions of feasibility and usefulness of preservation. The declarations of Richard E. Kiszka, Ernest J. Williams and Manley J. Luckey are set out verbatim below:

Declaration of Richard E. Kiszka

"I, RICHARD E. KISZKA, declare as follows:

My name is Richard E. Kiszka. I am presently employed as Laboratory Director of California Forensic Laboratory, Inc. I have been employed in the field of Forensic Toxicology for approximately fifteen years. During this time I have personally analyzed over 50,000 biological samples to determine their alcohol content for various Law Enforcement agencies in the State of California. I have been in my present position since June of 1979. I was previously employed as the Forensic Toxicologist for the San Mateo County Coroner's Office for approximately five years, during which time I was certified Forensic Alcohol Supervisor in charge of the Forensic Alcohol Blood, Breath and Urine Testing Program in San Mateo

County. The Omicron Intoxilyzer Model 4011 was and still is the breath testing device used in San Mateo County.

Presently, I am licensed by the State Department of Health Services as a Clinical Toxicology Technologist and I am a Board Certified Toxicologist. I have qualified as an expert witness in well over 1000 cases in both Municipal and Superior Courts in this State.

Breath testing is the least regulated chemical test by the Department of Health Services for determining a blood alcohol equivalent.

The Intoxilyzer Model 4011A as used in Contra Costa County does not require a calibration check before or after each subject tested on these instruments.

The newest version of the Intoxilyzer Model 4011 ASA is used in two states, Texas and Louisiana. These two states require a calibration check before or after the subjects tested. This instrument operates by push button, not dials.

The Intoxilyzer Models 4011, 4011AW and 4011A have all demonstrated that they are subject to intermittent malfunctioning, especially in the printing mechanisms.

The Intoxilyzer Models 4011, 4011AW, and 4011A have been demonstrated to be non-specific for ethyl alcohol.

The Intoxilyzer Model 4011A does not require any modification to its basic design to have the exhaust tube from the breath chamber be extended out of the side of this device.

The exhaust tube would then be in the same configuration as in the Models 4011, 4011AW and 4011AR.

There is a method available utilizing a device called a Silica Gel tube that can capture and preserve the ethyl alcohol from a breath sample previously captured by the Intoxilyzer.

This method was developed by Luckey Laboratories specifically for use with the Intoxilyzers. Furthermore, this method has been evaluated by the State

Crime Labs of Arizona, Colorado, and Delaware. The evaluations demonstrate a high degree of accuracy and reliability and is specifically being used in Arizona and Colorado for the purpose of capturing the sample from the breath chamber.

At this time the Dept. of Health Services does not regulate the re-testing of blood, urine, or breath samples. A Silica Gel tube used for this purpose would therefore not fall under the regulations for Forensic Alcohol Labs and would not be evaluated by the Dept. of Health Services.

There is a device approved for the field capturing of a breath sample called the Indium Crimper which was previously available in Contra Costa County. In switching to the Intoxilyzer, they obviously made a conscious choice to switch to a method which would no longer preserve a breath sample. The crimping device is capable of trapping three aliquots of a single breath sample. Two portions would be analyzed by the prosecution and one part would be available for retesting. If properly collected, stored and analyzed they have been demonstrated to be reliable for testing up to at least sixty days.

I have personally conducted approximately 50 tests with the Silica Gel tubes and the Intoxilyzer. The Silicia Gel tubes were analyzed utilizing a gas chromatograph procedure. I found a high degree of agreement between these tube results and the Intoxilyzer results.

There are other methods which can be used to capture a breath sample from the Intoxilyzer using Calcium Sulphate or charcoal, as examples

However, the Silica Gel tubes are available from a local supplier and are inexpensive. The present price per tube (if bought in lots of 1000) is eighty-five cents each.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on June 15, 1982 at Foster City, California.

/s/ Richard E. Kiszka"

Declaration of Ernest J. Williams

"I, Ernest J. Williams, declare as follows:

1. I am a graduate of University of Texas at Arlington, Texas, with a Bachelor of Science degree in Chemistry. I also possess a Masters degree in Criminalistics from California State University at Los Angeles, California.

2. My relevant professional experience consists of seven (7) years as a criminalist with two different police agencies, the Los Angeles Police Department and the Long Beach Police Department.

3. I have been the owner and operator of my own criminalistics laboratory, Analytical Forensic Laboratories at 11669 Firestone Boulevard in Norwalk, California for the past year and a half. Analytical Forensic Laboratories specializes in the re-analysis of blood, breath and urine samples for alcohol content, as well as the evaluation of the subjects demeanor at various blood alcohol levels and physiological aspects of effects of alcohol consumption.

4. My appearances in courts of law as an expert witness have been in excess of two hundred and sixty (260) in number and have been primarily at the municipal court level, however I have also appeared at the superior court level. My appearances have been primarily in Los Angeles County, however I have also appeared in the counties of Ventura, Orange, San Diego, San Bernardino, Mono, Sacramento and Monterey as well as Anchorage, Alaska.

I have also appeared before the Criminal Justice Committee, of the California Assembly, in February 1981, to discuss chemical tests for alcohol determination.

5. A breath alcohol test result obtained on any breath testing instrument can be checked for accuracy if the arresting agency captures and saves a portion of defendant's breath within a reasonable time, before or after, the suspect submits to the breath test. If no breath testing instrument is available, the breath sample can still be saved for later analysis, and this is a practice followed by the San Bernardino County

Sheriff's Department for prosecution purposes when a subject elects to take a breath test and the nearest breath testing instrument is located at a considerable distance from the point of arrest. The device currently available for capturing the breath sample for later analysis, the Indium Tube Encapsulation, has been tested for accuracy by the Department of Health and approved for use in the State of California. This device would cost the arresting agency approximately Ten dollars ($10.00) per test, a sum of money that falls easily within the Thirty-Five dollars ($35.00) received from the State of California by the arresting agency for each conviction of drunk driving which Thirty-Five dollars ($35.00) is for the specific purpose of paying the costs of analysis. See Penal Code § 1463.14.

The breath sample captured by the indium tube encapsulation device provides a breath sample equivalent to the breath sample analyzed by the breath testing instrument. This indium tube sample would technically be comparable to that portion of a blood or a urine sample remaining in a sample vial after a portion of that blood/urine had been removed by the laboratory analyst and destroyed via analysis. Just as an analysis by an independent laboratory of the remaining blood/urine sample can be used to determine the accuracy of the prosecuting agencies original analysis performed on that portion of the blood/urine sample destroyed during their analysis, the captured breath sample can be used to determine the accuracy of the breath-alcohol anlysis performed by any breath testing instrument.

6. The types of errors in breath-alcohol analysis that could be corrected/detected by the analysis of a captured breath sample by an independent laboratory are the following:

1. Saliva is known to be rich in alcohol content if the alcohol in the blood is distributed throughout the body. Because of this fact, eleven states will permit a suspect arrested for driving under the influence of alcohol case to submit a saliva sample to determine that subject's blood-alcohol level. The relationship between alcohol in saliva and alcohol in breath is that saliva

will contain approximately 2300 times more alcohol than an equal volume of breath. When one considers the quantity of alcohol detected by breath testing instruments for a reading of 0.10%, for example, the intoxilyzer instrument detects 0.007 drops of ethyl alcohol, the potential for error resulting from the breath sample being contaminated with saliva becomes readily apparent. A breath sample captured by the indium tube encapsulation method does not have this problem because this method uses a filter between the mouthpiece and the capturing tube. The Intoxilyzer instrument does not have this filter device. Therefore, if a breath test result done on an intoxilyzer is erroneous because of contamination with saliva, this error could be detected by analysis of the captured breath by an independent laboratory.

2. In the case of a breath testing instrument known as the Intoxilyzer, specificity can be a problem. The Intoxilyzer does have the ability to respond to chemical compounds other than ethyl alcohol. The number of chemical compounds that the Intoxilyzer can respond to, and report as an erroneous high blood alcohol content, can be conservatively estimated as numbering in the tens of thousands. The instrument that would be used to analyze captured breath samples, the Gas Chromatograph Intoximeter, is a more specific instrument than the Intoxilyzer. Therefore, if the Intoxilyzer was used to test the original sample any erroneously high breath test result from the presence of chemical compounds other than ethyl alcohol would probably be detected by using the more specific instruments, i.e. the Gas Chromatograph Intoximeter.

3. A captured breath sample would also serve to detect malfunctions that may occur in the breath testing instrument at the time of the defendant's test by allowing an independent laboratory to determine if their results compare favorably or unfavorably with the original breath test result.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on June 16, 1982, at Cerritos, California.

/s/ Ernest J. Williams"

Declaration of Manley J. Luckey

"I Manley J. Luckey declare as follows:

1. My qualifications are attached hereto as exhibit A.

2. I invented and developed the Mobat Sober-Meters and Alco-Analyzer Gas Chromatograph and my Company, Luckey Laboratories Inc., manufactures and distributes these devices.

3. Among the breath testing devices described in item 2 above, are the Silica Gel Preserved Sample Tubes. The Silica Gel Preserved Sample Tubes preserve the total amount of alcohol from the Intoxilyzer during a breath analysis.

4. The Silica Gel method of absorption of vapors is well defined in chemical procedures — its been used by chemists for years.

5. My Laboratory has used Silica Gel for capturing ethyl alcohol vapors in human breath for 15 years and recently I was the primary consultant for the Intoxilyzer manufacturer (C.M.I.) for the installation of the Silica Gel Preserved Sample Tubes on the Intoxilyzer for use in Colorado, Delaware, Arizona and elsewhere as required, and these Preserved Sample Tubes have proved, under rigorous analysis and routine usage, to be extremely accurate and precise.

6. The Silica Gel Preserved Sample Tube has also enhanced the Intoxilyzer by making it possible to subsequentially analyze the specimen of breath for specific chemical components and such reanalysis if performed on an Alco-Analyzer Gas Chromatograph or any other Gas Chromatograph can be specific for ethyl alcohol and other drugs. The Silica Gel Preserved Sample Tubes absorp all vapors from a breath sample and a subsequent analysis by a Gas Chromatograph can differentiate between various chemical components.

7. In my opinion based on years of research in this particular field, breath testing devices, these Silica Gel Preserved Sample Tubes combined with the Intoxilyzer machine (model 4011A or any model of

Intoxilyzer) will provide an inexpensive, authoritative and accurate method for a confirmatory retest that is specific for ethyl alcohol. With the addition of Silica Gel Preserved Sample Tubes, the Intoxilyzer can be used to effectively preserve a sample for later retesting which the Intoxilyzer instrument alone does not accomplish. And, said Silica Gel Preserved Sample Tubes can readily be later retested for verification by the Defendant on a Gas Chromatograph if he chooses. Without the Silica Gel Preserved Sample Tubes, the Intoxilyzer captures, collects and possesses a breath sample during its analysis of said breath sample but the Intoxilyzer does not preserve a sample.

8. All breath testing instruments can be modified to use Silica Gel Preserved Sample Tubes without harming the instruments original intended testing capability.

9. The longevity of the Silica Gel Preserved Sample Tubes is indefinite. This Laboratory has tested Silica Gel Preserved Sample Tubes for longevity and the tubes have been definitely found to yield accurate retesting results for at least 8 months.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on June 17, 1982 at
San Bernardino, California
/s/ Manley J. Luckey"

EXHIBIT A

Resume of Manley J. Luckey

Resume of Manley J. Luckey: Qualifications for expert witness in the field of alcohol and its effect upon driving.

1. Graduate chemist from the University of Loma Linda 1950 with a B.A. Degree in Chemistry.
2. Director of the Chemistry Department at County Hospital in San Bernardino as Bio-Chemist and Toxicologist for 1½ years.
3. Established Luckey Laboratories Inc. over 30 years ago which specializes in the field of alcohol analysis.

4. Acted as Chemist and Toxicologist for over 27 Counties in California doing their Drunk Driving analysis and testifying in court.
5. Have testified in Courts throughout the United States.
6. Have testified more than 5000 times in Drunk Driving Trials.
7. Owner and Director of Luckey Laboratories Inc., which manufactures sobriety testing equipment that is used all over the world.
8. Have written manuals on the operation of Breath Testing equipment as well as Training Manuals in the field of operation of Breath Testing Equipment.
9. Have published articles in this filed in the Journal of Forensic Science.
10. Inventor and holder of patents for the following equipment, the Alco-Analyzer, Sober-Meter, Mobat, Drink-O-Meter and the Silica Gel Preserved Sample Tube.
11. Trained States and Local Law Enforcement groups in the correct use of Breath Testing Equipment.
12. Trained Chemists, Health Departments and State Laboratories in alcohol analysis procedures.
13. Certified Forensic Alcohol Supervisor in the State of California.
14. Member of the Northwest Association of Forensic Scientists.
15. Used as consultant in this field by Federal, State and local groups."

(Record, Traverse/Denial to Return to Order to Show Cause—*Ward,* Exhibits A, B and C.)

It is Respondent's understanding that the United States Supreme Court, in their review of this litigation, must view it through the window of the record. The record in this case as is evidenced by the declarations of experts Kizka, Williams and Luckey, among others, is replete with evidence supporting Respondents' position while the record is bare of evidence supporting the Petitioner's position. The only logical reason for the bareness

is that the Petitioner was unable to present competent experts with contrary opinions.

It is significant to note that the Petitioner did not produce any counter declarations of experts or otherwise to:

1. the declarations of Kiszka, Williams and Luckey in the Habeas Corpus proceedings in the *Ward* case;
2. the declaration of Parker in the Municipal Court in the *Ward* case;
3. the testimony and the declarations in the *Trombetta* and *Cox* cases.

Subsequent to the Colorado Supreme Court decision in *Garcia v. District Court, 21st Jud. Dist.* (Colo. 1979) 589 P.2d 924, the Colorado Department of Health adopted Rules and Regulations Relating to Chemical Tests for Blood Alcohol which require preservation of breath samples for referee analysis at the request of the defendant and specify various approved methods for preservation for later analysis. Among those devices approved for collection for later retesting are the Silica Gel cylinder method used in conjunction with the Omicron Intoxilyzer and also the Kit is approved for collection for later analysis. *Trombetta* Exhibit "F" in evidence, J.A. 267-290, R.T. 32-33. The previous existing rules and regulations in use in Colorado, before the *Garcia* decision are also a part of Exhibit "F". See J.A. 259-267.

As *Trombetta* Exhibit "F" shows, the law and the Rules and Regulations relating to chemical tests for blood alcohol in Colorado before *Garcia* were similar to those in California at the time of *Trombetta*.

Although the materiality of a breath sample on the central issue of guilt or innocence of one accused of driv-

ing under the influence is obvious, that which makes the materiality even more apparent is the presumption which existed under California law at the time of the instant arrests. California Vehicle Code Section 23126 at the time of these arrests created a rebuttable presumption of guilt where the alcohol level was .10 percent by weight of alcohol in the person's blood.

The new California statute enacted since these arrests is more potent wherein it creates a stronger presumption of guilt on a blood alcohol level of .10. See California Vehicle Code Section 23152(b).[4]

It is in the foregoing setting that the constitutional issues involved here should be considered.

SUMMARY OF ARGUMENT

In the Petitioner's Summary of Argument, it makes no reference to the record in this case. That omission is readily understandable because the record in this case establishes clearly that at the time of arrest of each Respondent, law enforcement had the capability of preservation of breath samples for independent analysis at Respondents' expense; that the instrument used by law enforcement, (the Omicron Intoxilyzer) is, in addition to other problems, non-specific for alcohol, e.g. acetone registers as alcohol; that a method for preservation of breath samples had been approved by the State of California, (the Kit); that other scientifically reliable means of preservation of breath samples were available, (the Silica gel cylinder); that the methods of preservation of breath samples are simple, physically and financially feasible,

[4]"Section 23152 driving under the influence" . . . (b) It is unlawful for any person who has .10 percent or more, by weight, of alcohol in his or her blood to drive a vehicle."

and that the test results on the preserved samples would produce scientifically accurate results which would verify the accuracy or establish the inaccuracy of the law enforcement test and would, therefore, be material on the question of guilt or innocence of the accused; that one method of retesting the sample preserved by the Kit or Silica gel cylinders is on an approved device, the Gas Chromatograph Intoximeter Mark II or IV which are specific for alcohol and more scientifically reliable than the Omicron Intoxilyzer.

The administering and taking of a breath test has as its primary function obtaining evidence on the question of guilt or innocence of the subject and is the most determinative type of evidence available to convict in a driving under the influence case. It is therefore obviously material to the central issue of guilt or innoncence. Where law enforcement's test results are inculpatory and give rise to a presumption of a violation of law if .10 by weight of alcohol or greater is found in the person's blood, it is even more essential that a sample be preserved for referee anlysis because the test performed by law enforcement may have been invalid or erroneous. The failure to preserve a sample, despite the technology to do so, effectively precludes a defendant from having a fair trial, as the evidence, if preserved for retesting "might have affected the outcome of the trial". *U.S. v. Agurs* (1976) 427 U.S. 97, 104, 49 L.Ed.2d 342, 350.

The character of this evidence is a body substance from the defendant himself and the harm to defendant by its non-preservation can obviously be devastating. To deny defendant a retest of his own body substance where the technology exists is the breach of such a fundamental right that due process is violated.

Due process, as set out in *Brady* and developed in *Agurs* and *Bryant*, and recognized in *Augenblick*, requires, that where the state has gathered, collected or possessed evidence that is material in nature, as it is here, (the accused's own body vapor), it must make an earnest effort to preserve that evidence or its equivalent for the defendant's use. Failure to do so should result in an exclusion of the results of the test at trial.

Petitioner argues that *California Vehicle Code* Section 13354(b) provides a "right" to an accused to obtain his own test and that this provides him with all the due process to which he is entitled. This "right" is hollow because at the time of these arrests there was no requirement that Respondents be informed of, nor did they know of this "right". The State should not be able to shift its duty to preserve material evidence to the Respondent without at least advising him of the shift. Further, such a test would be untimely and subject to the criticism that because of the time necessarily elapsing between the two tests, the results of the later test are not relevant. Involved also are the practical problems of locating an expert willing to perform such testing, probably after business hours, and the accused's ability at that time to meet the significant cash demands of the expert. The circumstances can be likened to an attempt to persuade a doctor to make a housecall. Because of the disparity in resources, it is far easier and more useful to the parties involved for law enforcement to preserve a sample for retesting rather than rely on the empty promise of *California Vehicle Code* § 13354(b).

At the very least, due process requires that where destructive testing is utilized by law enforcement, the accused should be informed that no evidence will be preserved for retesting, so that the accused may make an informed choice of what chemical test to choose. (In California, samples of

blood and urine are required to be retained for one year for retest by the defendant, *Trombetta* Exhibit "D", J.A. 207, R.T. 30-31).

Since *Trombetta,* emergency legislation has been enacted in the form of *California Vehicle Code Section* 13353.5. This section requires the accused be informed that the testing equipment does not retain a breath sample and that none will be retained. The Section also requires that law enforcement advise the person that because no breath sample will be retained, the person will be given the opportunity to provide a blood or urine sample for subsequent analysis.

Respondents contend that they were also denied Equal Protection of the Law again under the 14th Amendment. Title 17 of the *California Administrative Code* requires preservation of blood and urine samples for defendant's independent testing, but is silent on preservation of a breath sample. Suspects of driving under the influence of alcohol are similarly situated no matter which of the three available tests they choose and, as the record below establishes, there is *no* reason why a sample of the breath cannot be preserved. Presumably, the reason for the discriminatory treatment was that, when these Administrative Code provisions were enacted, there was no technology to retain breath. That justification became invalid many years ago with the development of reliable breath preservation techniques. Further discussions of this argument is omitted because this Court did not request briefing on this issue.

ARGUMENT

I.

Where Material Evidence Which Might Have An Effect On The Outcome Of A Trial Is Collected And Possessed By The State In A Criminal Case As It Is With The

Omicron Intoxilyzer Which Collects And Possesses A Suspect's Breath, [A Body Substance], Federal Due Process Requires That Where The Technology Now Exists, Law Enforcement Agencies Establish And Follow Rigorous And Systematic Procedures To Preserve The Collected And Possessed Evidence Or Its Equivalent For Retesting By The Suspect, At His Expense.

In *Brady v. Maryland* (1963) 373 U.S. 83, 87, 10 L.Ed.2d 215, 218, the genesis of the due process right of defense access to material information, this court explained that:

> "We now hold that the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution.
>
> The principle of *Mooney v. Holohon* is not punishment of society for misdeeds of a prosecutor but avoidance of an unfair trial to the accused. Society wins not only when the guilty are convicted but when criminal trials are fair; our system of the administration of justice suffers when any accused is treated unfairly. An inscription on the walls of the Department of Justice states the proposition candidly for the federal domain: 'The United States wins its point whenever justice is done its citizens in the courts.' A prosecution that withholds evidence on demand of an accused which, if made available, would tend to exculpate him or reduce the penalty helps shape a trial that bears heavily on the defendant. That casts the prosecutor in the role of an architect of a proceeding that does not comport with standards of justice, even though, as in the present case, his action is not 'the result of guile,' to use the words of the Court of Appeals. 226 Md., at 427, 174 A.2d, at 169."

Developing these cogent observations, this court announced in *United States v. Agurs* (1976) 427 U.S. 97, 103, 49 L.Ed.2d 342, 350:

> "A fair analysis of the holding in Brady indicates that implicit in the requirement of materiality is a concern

that the suppressed evidence *might have* affected the outcome of the trial." (emphasis added.)

In the case of *United States v. Bryant* 439 F.2d 642, 647-648 (1971 D.C. Cir.) the court discussed the prosecutor's duty to preserve a secret tape made of conversations between the suspects and an undercover agent from the Bureau of Narcotics and Dangerous Drugs during a drug sale in a hotel room. The tapes contents were unknown and it was admitted that the government made no effort to preserve the tape. The court did not know whether the tape would corroborate or impeach the agents testimony. The court explained:

> "In the leading Supreme Court decisions concerning the due process requirement of disclosure, the content of the non-disclosed evidence has always been known. The standard of constitutional coverage thus has turned upon the extent to which the evidence is 'favorable' to the accused. Although the Supreme Court has not yet attempted to define this standard with precision, it is the law in this circuit that the due process requirement applies to all evidence which 'might have led the jury to entertain a reasonable doubt about (defendants') guilt, and that this test is to be applied generously to the accused when there is 'substantial room for doubt' as to what effect disclosure might have had.
>
> Were *Brady* and its progeny applicable only when the exact content of the non-disclosed materials was known, the disclosure duty would be an empty promise, easily circumvented by suppression of evidence by means of destruction rather than mere failure to reveal. The purpose of the duty is not simply to correct an imbalance of advantage, whereby the prosecution may surprise the defense at trial with new evidence; rather, it is also to make of the trial a search for truth informed by all relevant material, much of which, because of imbalance in investigative resources, will be exclusively in the hands of the Government."

Further, the court held that the prosecutor's duty to disclose first becomes applicable once the government has gathered and taken possession of the evidence. Otherwise, prosecutors could thwart their duties to disclose by destroying vital evidence before prosecution begins. The court held:

> "Hence we hold that before a request for discovery has been made, the duty of disclosure is operative as a duty of preservation. Only if evidence is carefully preserved during these early stages of investigation will disclosure be possible later." *United States v. Bryant* (1971 D.C. Cir.) 439 F.2d 642, 651.

The use here by California law enforcement of a device to collect and test material evidence without preservation of such evidence or its equivalent where there is a present ability to do so is:

> ". . . tantamount to suppression of that evidence. It is incumbent upon the state to employ regular procedures to preserve evidence which the State agent, in the regular performance of his duties, could reasonably foresee 'might be' 'favorable' to the accused." *Garcia v. Dist. Court, 21st Jud. Dist.* (Colo. 1979) 589 P.2d 924,930. (J.A. 25)

In a California Supreme Court decision, *People v. Nation* (1980) 26 Cal.3d 169, 161 Cal.Rptr. 299, the non-preservation of a semen sample in a rape case was the issue before the court. The court reasoned that where there is no opportunity to examine the suppressed evidence (as it is here in *Trombetta* because of no retention of the same or a similar breath sample, and where no effort to preserve was made) because of its destruction by the authorities, the evidence will be deemed to be material for purposes of due process if there is a reasonable possibility that it would be favorable to the accused on the issue of guilt or innocence. An analysis of a breath sample in the present cases might

here not only impeach the credibility of the prosecution test but might completely exonerate the defendant. Here, in *Trombetta,* law enforcement used equipment which it knew did not allow for preservation of a sample and admittedly took no steps to preserve a substantially similar sample. Law enforcement must not be permitted to make this decision of preservation for a person accused of a major misdemeanor that carries serious consequences on conviction, including incarceration, fine, driver's license' suspension which may jeopardize a job and increased cost of auto insurance.

A strong argument can be made that preservation and retesting of a breath sample will serve in many cases to confirm that the accused was indeed driving under the influence and will cause the prompt disposition of these cases by guilty pleas.

The latest California Supreme Court pronouncement on the subject of the duty of preservation of material evidence is found in *People v. Moore* (1983) 34 Cal.3d 215, — Cal.Rptr. —, 666 P.2d 419. There, a unanimous Supreme Court held that a probation department has a due process duty to preserve and disclose a urine sample when that sample and the results of the test on it are used as the basis for revocation of probation. In *Moore,* the defendant had been convicted as a result of his plea of guilty to various drug violations and was granted probation. One of the conditions of probation required the defendant submit to regular narcotics testing. At the direction of defendant's probation officer defendant supplied a urine sample which was subjected to tests indicating the presence of a controlled substance. Defendants' counsel requested inspection of the urine sample but it had been discarded. The court held that evidence of the results of tests of the urine sample must be excluded. In

the court's review of the pertinent authorities on the issue, this unanimous California Supreme Court said:

> "This court held that an investigative agency has a duty to preserve and disclose evidence material to the guilt or innocence of the accused (*People v. Hitch, supra,* 12 Cal.3d at p. 652) and that the duty arise even in the absence of a request from the defendant. (*Id.,* at p. 650; see also *People v. Nation* (1980) 26 Cal.3d 169, 175 (161 Cal.Rptr. 299, 604 P.2d 1051).)
>
> *Hitch* relied on the reasoning of *United States v. Bryant* (D.C.Cir. 1971) 439 F.2d 642, which explained that 'before a request for discovery has been made, the duty of disclosure is operative as a duty of preservation.' (*Id.,* at p. 651.) Bryant involved the government's loss of tape recordings of conversations between defendants and government agents which were crucial to the issue of defendant's participation in a narcotics transaction. In concluding that the government had a duty to show that it had used 'rigorous and systematic procedures designed to preserve *all* discoverable evidence gathered in the course of a criminal investigation.' (*id.,* at p. 652, fn. omitted), the court underscored that '[t]he purpose of the duty is not simply to correct an imbalance of advantage, whereby the prosecution may surprise the defense at trial with new evidence; rather, it is also to make of the trial a search for truth informed by all relevant material, much of which, because of imbalance in investigative resources, will be exclusively in the hands of the Government.' (*Id.,* at p. 648, fn. omitted.)
>
> Other federal courts have suggested that the government's failure to preserve discoverable evidence amounts to a denial of due process: 'Loss or destruction of relevant evidence by the government not only raises general questions of the fundamental fairness of a criminal trial, but may also deny a defendant the right to compulsory process.' (*Government of Virgin Islands v. Testamark* (3d Cir. 1978) 570 F.2d 1162, 1166.)
>
> That the government has an obligation to preserve and disclose material evidence is thus clear.

The question becomes whether the urine sample in this case constituted such material evidence.

When the evidence is no longer in existence, the burden of establishing that the evidence is material is met when the defendant shows that there is 'a reasonable possibility that the evidence, if preserved, would have constituted favorable evidence on the issue of guilt or innocence. (*People v. Hitch, supra,* 12 Cal.3d at p. 649.)' (*People v. Newsome* (1982) 136 Cal.App.3d 992, 1001 (186 Cal.Rptr. 676).) This burden is met when the evidence by its nature could reasonably be used to impeach the credibility of the prosecution witness' testimony regarding the evidence. In this respect, the urine sample in this case is quite analogous to the ampoule in *Hitch.* As the conclusions regarding the test ampoule would have been subject to impeachment, so too there exists a reasonable possibility that independent testing of the urine sample in this case could yield results that would undermine the prosecution's case. This conclusion is bolstered by the testimony of the chief toxicologist, who claimed that '[t]here's a lot of incompetence in this work.' The clear implication of that testimony is that test results could differ depending upon who performed the analysis.

For purposes of materiality, the evidence in this case is also similar to a semen sample obtained from the vagina of a rape victim, which has been found to be necessarily material evidence requiring preservation. (*People v. Nation, supra,* 26 Cal.3d 169; *People v. Newsome, supra,* 136 Cal.App.3d 992, 1001.)

Because the evidence in question is no longer available, it is impossible for this or any court to determine whether in fact the urine sample would have been favorable evidence to the defendant. However, it is the government's loss of evidence that requires speculative inquiry as to its materiality. Of course, when the evidence is available but has been suppressed by the prosecution, the court is in a better position to determine whether the suppressed evidence is substantially material. This court specifically distin-

guished such situations in *Hitch*. Referring to *Brady v. Maryland* (1963) 373 U.S. 83 (10 L.Ed.2d 215, 83 S.Ct. 1194), *Giglio v. United States* (1971) 405 U.S. 150 (2 L.Ed.2d 321, 78 S.Ct. 311), and *In re Ferguson* (1971) 5 Cal.3d 525 (96 Cal.Rptr. 594, 487 P.2d 1234), we stated that in those cases the suppressed evidence was neither lost nor destroyed, therefore 'the court was in a position to examine the suppressed evidence, decide whether or not it was favorable to the accused and ultimately to determine whether or not it was material. . . .'

In this case, the loss of the evidence necessarily means that the defendant will be unable to make a showing of materiality beyond claiming that he did not ingest PCP. This the defendant did by denying in open court that he violated probation." *People v. Moore* (1983) 34 Cal.3d 215, 220-221, — Cal.Rptr. —, 666 P.2d 419.

As in *Moore, Trombetta* is a case where the evidence collected and possessed by the State on the Omicron Intoxilyzer was prima facie inculpatory, but there was a failure to preserve the evidence or its equivalent. As a result, the defendant was effectively precluded from retesting his own body substance to challenge the veracity of the prosecution's evidence.

It is interesting to note that the chief law enforcement officer of the State of California did not advise this court of the *Moore* decision. Respondents submit it was incumbent upon the Attorney General to bring *Moore* to the attention of the United States Supreme Court because this honorable court's decision in *Trombetta* will affect a multitude of other criminal cases involving many types of evidence.

The primary types of evidence in a driving under the influence case are chemical tests and the observed conduct of the accused. Experience tells us juries decide these

cases on the basis of the chemical tests, making the chemical test crucial evidence.

A compelling reason for requiring preservation of a sample of breath of an accused in a driving under the influence case where the Omicron Intoxilyzer is used by law enforcement to measure the alcohol content of the breath is that this Intoxilyzer is non-specific for alcohol. This means that other body derivatives, such as acetone, cause this instrument to register these foreign substances as alcohol. This problem of nonspecificity for alcohol is uncontroverted. An example of where the non-specificity for alcohol of the Omicron Intoxilyzer results in a denial of due process where no breath sample is preserved is with a dieter who produces an increased level of acetone. If a dieter had a blood alcohol level within the legal limit (i.e. .07%) the acetone, errantly measured by the Omicron Intoxilyzer as alcohol, could raise the test result over and above the legal limit (.10%). But for preservation of a sample for retest on a Gas Chromatograph Intoximeter which is able to differentiate between acetone and alcohol, the defendant, his lawyer and law enforcement would never know that the law was not violated and the Omicron Intoxilyzer registered a false positive. Innocent victims have undoubtedly already been convicted of driving under the influence of alcohol as a result of false positive readings by the Omicron Intoxilyzer where acetone was measured as alcohol. That preservation is essential to arriving at due process is borne out by other weaknesses of the Omicron Intoxilyzer such as:

1. machine malfunction;
2. faulty calibration;
3. human errors (arresting police officers administer the Intoxilyzer test unlike the testing of the blood and urine).

The ability of reanalysis to reveal the errors or confirm the accuracy of the test by law enforcement on the Omicron Intoxilyzer indicates the need for preservation of the breath sample or its equivalent.

II.

Responses To What Respondents Perceive To Be The Basic Cases Relied On By Petitioner.

(a) Petitioner's reliance on United States v. Augenblick is misplaced.

Petitioner relies on *United States v. Augenblick* (1969) 393 U.S. 348 for the proposition "that the loss or destruction of evidence was not a federal constitutional question with overtones of due process." (Brief for Petitioner, p. 8) On careful examination of *Augenblick* it is clear that this court recognized at page 355, that ". . ., an earnest effort was made to locate them" (referring to the lost tape recording made by government agents of an interview of Augenblick and one Hodges during an investigation resulting in a court-martial of Augenblick). The tapes involved in *Augenblick* had initially existed but were lost, whereas in *Trombetta,* it was "conceded that no effort was made to capture breath specimens for later testing by the defense." (*Trombetta* opinion, J.A. 158). There was no "earnest effort" in *Trombetta* and there was an earnest effort in *Augenblick.*

In *Augenblick,* this court also said at pages 355-366, that "the law officer properly ruled that the government bore the burden of producing them (the tapes) or explaining why it could not do so."

In *Trombetta,* the "government" failed in its burden to produce a breath sample and it had no explanation as to why it could not do so, as the uncontroverted evidence established that the breath samples could have been pre-

served by the "government" but it consciously chose not to do so. Again, the "government" had at one time in Sonoma and Contra Costa Counties saved samples but had stopped doing so before the time of the instant arrests.

The other item of evidence under discussion in *Augenblick*, i.e. the handwritten notes, were not "substantially verbatim" and consequently were insignificant.

(b) The Trombetta Court appropriately analyzes the decision in People v. Miller as being fundamentally erroneous wherein Miller postulates that there is no possession of the breath during the Omicron Intoxilyzer testing.

The petitioner again argues that because the state "never had" the breath, it is an "astounding proposition" to ask that they be accountable for a sample. (Brief for Petitioner, p. 15) The record, which Petitioner again ignores, establishes that in testing on the Omicron Intoxilyzer, breath is gathered, collected and possessed.

The *Trombetta* Court, on the possession issue alone, all but overruled *People v. Miller* (1975) 52 C.A. 3d 666, 125 Cal.Rptr. 341, — P.2d —:

> "The *Miller* court determined that 'Hitch [People v. Hitch (1974) 12 Cal.3d 641] merely holds that evidence which the prosecution once possessed must be held. The test by intoxilyzer . . . may have gathered evidence in the sense of placing the breath in the chamber but it was not evidence of which the government could 'take possession.' The only element reducible to possession was the printout card which has been preserved. (citation)
>
> We disagree fundamentally with the *Miller* characterization of what happens when a breath sample is taken. That is, in our view, such a taking is a collection of evidence within the Hitch rationale. The question then is whether the specimen may be exhausted in testing without taking available steps to obtain and preserve another specimen for retesting.' " (brackets

added) *People v. Trombetta,* supra, 142 Cal.App.3d at 143, 144, 125 Cal.Rptr. 341 (J.A. 158)

Also, the decision in *Miller* is completely devoid of any evidence regarding then available state-approved equipment to preserve a sample of the breath, mentioning only the Intoxilyzer and the Breathalyzer. *People v. Miller* (1975) 52 C.A. 3d 666, 668, 125 Cal.Rptr. 341. Significantly, the *Miller* decision doesn't even mention the Kit, Silica Gel cylinders or any other of the then available reliable means of breath sample preservation. There is also no mention of the Gas Chromatograph Intoximeter Mark II or IV into which the compartments created by the Kit are inserted to determine blood alcohol content. This test is specific for ethyl alcohol, able, unlike the Omicron Intoxilyzer, to exclude other non-ethyl alcohol vapors. Unlike the *Trometta* court, the *Miller* court may well not have known that there are and were available, reliable means of preserving breath samples. This may explain the different holdings.

It is also argued that the printout card is all the "evidence" of the test on the Omicron Intoxilyzer to which the defense is entitled. This leaves us only with the footprints. We may speculate on the nature of the beast that left the prints. We may agree or disagree with another person's concept of the beast based on the footprints. Collecting and preserving an independent sample of the substance tested presents us with the beast itself. We may count his scales and measure his tooth and claw.

Finally, the California Administrative Code, which regulates law enforcement in all types of testing for blood alcohol content, is entitled and speaks of "Breath Collection". Title 17, *California Administrative Code,* Section 1219.3 (*Trombetta* Exhibit "D" in Evidence, J.A. 223, R.T. 30-31.)

There is a "collection of evidence" in the use of the Omicron Intoxilyzer.

(c) State v. Young, relied on by Petitioner, recognizes as accurate the method of preservation of breath samples, (the Kit), and the reliability of subsequent testing.

Petitioner, throughout these proceedings, has attempted to and continues to decry and diminish the use of the Kit, utilizing such inadmissible references as the notes of a meeting of an ad hoc committee, entitled Advisory Committee on Alcohol Determination, Department of Health. (See Brief for Petitioner, pp. 27-28.) Despite these repeated ventures outside the record, the Kit nonetheless continues to be approved in California and is now used by law enforcement in San Bernardino County to obtain convictions.

Reliance by Petitioner on *State v. Young* (Kan. 1980) 614 P.2d 441, places the Petitioner directly on the horns of a dilemma. Petitioner relies on *Young* because *Young* insists that the Kansas Statute similar to Section 13354 (b) of the California Vehicle Code provides the necessary due process where it accords the accused the "right" to obtain his own later test. The other horn of the dilemma forces Petitioner to accept what Respondents are urging and Petitioner is vehemently denying. That is, that the Kit is a responsible and effective alcohol breath system for preservation when used with the Gas Chromatograph Intoximeter Mark II and Mark IV models, and is more reliable than the Omicron Intoxilyzer because the latter is not specific for alcohol. In *Young*, the Kit and the gas chromatograph were the devices used by law enforcement to obtain convictions for driving under the influence.

III.

Law Enforcement's Failure To Preserve Material Evidence, In The Face Of Available Steps To Preserve Such Evidence Or Its Equivalent, Requires The Suppression Of The Results Of Law Enforcement's Test At Trial.

Respondents urge that in the absence of malicious or deliberate destruction of the evidence (which destruction would require dismissal of the charges of driving while under the influence of alcohol) the constitutional remedy formulated by the *Trombetta* court is a reasonable and just disposition, to wit: the suppression of the results of the breath test at trial, unless law enforcement can establish that they followed a "rigorous and systematic procedure to preserve the captured evidence or its equivalent for the use of the defendant." (*Trombetta* opinion, J.A. 160)

IV.

Section 13354(b) Of The California Vehicle Code Does Not Provide The Suspect With Due Process Because The Suspect Was Not Made Aware Of This "Right" Nor Will The Exercise Of This "Right" Be Sufficiently Timely To Be Relevant And Because Of The Financial Expenditure Attendant Upon The Exercise Of This "Right".

Petitioner argues that *California Vehicle Code* Section 13354(b) affords due process to a person accused of driving under the influence because it gives such person a right at his own expense, to have "a test by a physician, registered nurse, licensed vocational nurse, duly licensed clinical laboratory technologist or clinical laboratory bioanalyst, or any other person of his or her own choosing." (Brief for Petitioner, p. 19)

The most glaring due process deficiency of this statute is that it did not require that the accused be informed of this alleged "right".

Assuming that the statute did provide for so informing the accused this so-called right is an illusory one at best because:

1. If the arrest occurred after business hours, when most arrests of this type do occur, the retaining of an expert by the defendant would present serious obstacles that would tend to invalidate the results of the subsequent test from the standpoint of the timeliness of the test. It is accepted toxilogical doctrine that any chemical test to determine blood alcohol content must be as close to being truly simultaneous as is possible. See *In re Martin* (1962) 58 Cal.2d 509, 512, 24 Cal.Rptr. 833;
2. Assuming such an untimely test is obtained, the prosecution is in the advantageous position of claiming that its test is more accurate because it is closer to the time of the offense;
3. The practical problem of finding an expert to respond at all to such a request is very real, not to mention the ability of a lay person to locate such an expert by use of the telephone directory at the jail house while under the stress of an arrest;
4. Also to be considered is the financial predicament that the suspect would be placed in under such circumstances. The expert who might well be in bed at the time of his requested intervention, would quite likely insist upon a sizeable fee for interruption and would want payment in cash which would likely not be available.

Finally, in spite of the fact that Section 13354(b) is an "empty promise", its existence nonetheless reveals that the legislature recognized the importance of a second test for r[illegible]eree analysis.

V.

California Has Reacted To The Trombetta Decision By Enacting Emergency Legislation, Effective September 15, 1983, Which Requires Law Enforcement To Advise A Per-

son Who Chooses To Submit To A Breath Test That The Breath Testing Equipment Does Not Retain A Sample Of The Breath And For That Reason A Blood Or Urine Sample Will Be Retained At No Cost To The Person For Later Analysis For The Alcoholic Content In His Blood.

Following the *Trombetta* decision emergency legislation was passed and California Vehicle Code Section 13353.5 was enacted to read, in pertinent part:

> "(a) In addition to the requirements of Section 13353, a person who chooses to submit to a breath test shall be advised before or after the test that the breath-testing equipment does not retain any sample of the breath and that no breath sample will be available after the test which could be analyzed later by the person or any other person.
>
> (b) The person shall also be advised that, because no breath sample is retained, the person will be given an opportunity to provide a blood or urine sample that will be retained at no cost to the person so that there will be something retained that may be subsequently analyzed for the alcoholic content of the person's blood. If the person completes a breath test and wishes to provide a blood or urine sample to be retained, the sample shall be collected and retained in the same manner as if the person had chosen a blood or urine test initially.
>
> (c) The person shall also be advised that the blood or urine sample may be tested by either party in any criminal prosecution. The failure of either party to perform this test shall place no duty upon the opposing party to perform the test nor affect the admissibility of any other evidence of the alcoholic content of the blood of the person arrested."

In enacting the above set out statute, the California legislature stated:

> "In order to provide a constitutional procedure for administering the breath test in light of the decision of the Court of Appeal in *People v. Trombetta* (1983) 142 Cal.App. 3d 138, it is necessary that this act take

effect immediately." (1983 legislation, Section 4 of Stats. 1983, C.841, p.3)

Petitioner, in discussing this new legislation, states "current California law gives the accused even greater protection". (Brief for Petitioner, p. 20, n. 13) Thus, there is no issue for determination by this court because the legislature of California has spoken affirmatively in response to *Trombetta.*

CONCLUSION

Respondents are aware of cases arguably contrary to *Trombetta,* (See discussion of these cases in Respondents' Brief in Opposition to Petition for Writ of Certiorari commencing at page 7 et seq.). In those cases which seemingly hold contrary to *Trombetta,* the record before those courts was inadequate to permit them to insist on preservation of a breath sample. Unlike these courts, *Trombetta* had before it an adequate record. Respondents submit that the better reasoned cases are in accord with *Trombetta.* See among other cases, *Baca v. Smith* (Ariz. 1980) 604 P.2d 617; *Garcia v. District Court, 21st Jud. Dist.* (Colo. 1979), 589 P.2d 924; *Municipality of Anchorage v. Serranno* (AK. 1982) 649 P.2d 256; *State v. Cornelius* (N.H. 1982) 452 A.2d 464; *People v. Hitch* (Cal. 1974) 12 Cal.3d 641, 527 P.2d 361; *People v. Nation* (Cal. 1980) 26 Cal.3d 169, 604 P.2d 1051; *People v. Moore* (Cal. 1983) 34 Cal.3d 215, 666 P.2d 419; *State v. Michener* (Or.App. 1976) 550 P.2d 449; *Lauderdale v. State* (AK 1976) 548 P.2d 376.

Respondents recognize that driving under the influence of alcohol is a current national problem of significant proportion and every lawful step to curb such conduct must be taken. However, Respondents also recognize that in so doing the same traditional observance of the con-

stitutional rights of a suspect must be zealously protected.

An affirmance of *Trombetta* in no way precludes Petitioner from proceeding with the trial of these cases with such other evidence as is available, such as, the observations of the arresting officer as documented in his investigation report, including the field sobriety tests.

For each of the foregoing reasons, Respondents respectfully request that the *Trombetta* decision be affirmed by this Honorable Court.

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